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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1974

NO. 74-1055

W. T. STONE, WARDEN,

PETITIONER,

vs.

LLOYD CHARLES POWELL,

RESPONDENT.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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OPINION BELOW

The opinion of the Court of Appeals is now reported. Powell v. Stone, 507 F.2d 93 (9th Cir. 1974).

QUESTIONS PRESENTED

1. Whether federal habeas corpus relief is available to review Fourth and Fifth Amendment claims of a state prisoner who has exhausted his available state remedies.

2. Whether an ordinance which makes it a crime to be a person who

> loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by a police officer to do so if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification

is unconstitutional because (a) it is vague on its face, (b) it was vague as applied to respondent, (c) it authorizes arrest and conviction on less than probably cause, and (d) it criminalizes the exercise of the privilege against self-incrimination.

3. Whether, under the above ordinance, a police officer had probable cause to arrest respondent who was walking with a companion in a shopping center parking lot during daylight business hours, cooperated with the officer when questioned, and correctly identified himself and gave an account of his presence.

4. Whether evidence seized in a search pursuant to an arrest under an unconstitutional vagrancy ordinance may be introduced into evidence.

5. Whether, if the murder weapon was erroneously admitted into at respondent's trial, it may be said beyond a reasonable doubt that the evidence of respondent's possession of the murder weapon, and evidence of the trigger pull of the weapon, did not contribute to respondent's conviction.

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STATEMENTS OF FACTS

The incident in question occurred on February 18, 1968, at the Bonanza Liquor Store, 1052 W. 5th Street, San Bernardino, California (Reporter's Transcript 8, hereinafter R.T.). The time of the occurrence was shortly after 12 o'clock midnight.

On the late evening of February 17, 1968, Mr. John Chaney, Mr. Lester Mercer, Mr. Fred Buckley, and respondent Lloyd Powell were in a cocktail lounge when they decided to go to a liquor store and purchase some liquor (R.T. 132). Mr. Mercer purchased cigarettes and beer, and attempted to

give Mr. Buckley some change to buy a drink (R.T. 67). At this time Mrs. Parsons, who was clerking behind the counter, suspected Mr. Powell had stolen some wine, and she leaned over and asked Mr. Powell if he was going to pay for the wine (R.T. 68). At about the same time, Mr. Parsons came from the back room to confront Mr. Powell. Mr. Powell responded, "What wine? I have no wine," whereupon Mr. Parsons grabbed his jacket stating, "You're going to pay for the wine that you have under your coat or what are you going to do?" (R.T. 68). Mr. Powell struck or pushed Mr. Parsons (R.T. 12).

Mr. Parsons asked his wife for the gun that was kept at the counter (R.T. 12, 69). There is conflicting testimony by the state's two witnesses, Mr. Parsons and Mr. Buckley, as to whether Mr. Powell left the store immediately after the scuffle. Mr. Parsons claims when he next looked up with the gun in his hand Mr. Powell was no longer in the store. He did not see him leave (R.T. 12, 13). On the other hand, Mr. Buckley testified that he never saw Mr. Powell leave the store (R.T. 70).

There is further confusion between the state's two witnesses as to what happened after Mr. Parsons was given the gun by his wife. Mr. Parsons testified he then pointed the gun at Mr. Powell and cocked it (R.T. 16, 70). Mr. Parsons claimed that he purposefully shot out of the line of fire, and then dropped the gun when Mr. Powell kept advancing (R.T. 16, 17). Mr. Buckley testified that Mr. Powell grabbed Mr. Parsons' arm and, in the struggle the gun discharged (R.T. 70). According to Mr. Buckley, the gun was never dropped, but rather a struggle over the gun ensued (R.T. 71). In any event, there was a total of three discharges from this gun - one entered the ceiling, one wounded Mr. Parsons, and one killed Mrs. Parsons. At one point Mr. Parsons got another gun and shot Mr. Buckley in the arm (R.T. 22, 87). Buckley ran out of the store after being shot leaving only Mr. Parsons and his wife in the store.

On the following day, Officer Lattin of the Henderson, Nevada Police Department observed Mr. Powell and Mr. Chaney walking together in the parking lot of a shopping center during daylight business hours. At this time shops were open and other shoppers were present (R.T. 158). Officer Lattin knew nothing of the shooting in California, nor did he know anything suggesting Mr. Powell was connected with any other specific crimes. They "appeared" to look in the direction of his police unit. (R.T. 195). The two men "quickly" turned and walked in the opposite direction. They walked in a "rather rapid manner," and thereafter split apart. Officer Lattin made a U-turn, radioed for another unit to stop Mr. Chaney, and pulled up behind Mr. Powell. He honked his horn and thereafter stopped his vehicle, alighted, and ordered Mr. Powell to stop. When Mr. Powell heard the officer's command, he immediately stopped.

Officer Lattin told Mr. Powell to produce his identification. Mr. Powell explained that it had been stolen from him earlier. At Officer Lattin's request, Mr. Powell gave him his true name--Lloyd Charles Powell--and his birthdate. Officer Lattin ran a name check through the Henderson Police Department with a negative result (R.T. 198). When told to account for his presence, Mr. Powell explained that he had been staying with friends in Las Vegas and he was on his way to Michigan.

Officer Lattin conceded that Mr. Powell appeared to be of an age corresponding with the birth date given

by him. The officer admitted he had no reason other than his own "suspicious nature" (R.T. 205) to believe the name and birthdate were false. There is no testimony that Officer Lattin made any attempt to confirm any part of the information given to him by Mr. Powell by checking with Mr. Chaney or the officers who were assigned to stop him. In addition, there is no evidence whatsoever that there had been any recent crimes in the shopping center, that the shopping center was a high crime area, or that there had been any reports of suspicious prowlers. Nevertheless, Officer Lattin arrested Mr. Powell for vagrancy under Henderson's vagrancy ordinance. After the arrest, Officer Lattin searched Mr. Powell and found the alleged murder weapon in Mr. Powell's coat pocket. It had six expended shells in its chambers.

Mr. Powell was taken to the station and, when it was discovered that he was wanted in California, he was transferred to the County of San Bernardino, California where he was charged with first degree murder. The circumstances surrounding his arrest, the gun, and Mr. Powell's attempt to change his name at the station were all introduced at the trial (R.T. 214-25). The jury convicted Mr. Powell of second degree murder, and he was sentenced to from five years to life.

I

ARGUMENT

A STATE PRISONER WHO HAS EXHAUSTED HIS AVAILABLE STATE REMEDIES MAY ADJUDICATE HIS FOURTH AND FIFTH AMENDMENT CLAIMS BY FEDERAL HABEAS CORPUS.

Petitioner contends that so long as a defendant has had a fair opportunity to raise his claims in state courts, federal habeas corpus relief

should not be available to a state prisoner who complains of an unconstitutional search and seizure. The appropriateness of habeas corpus in such cases has been confirmed by this Court's recent decision in Lefkowitz v. Newsome, 43 U.S. L.W. 4284 (U.S. Feb. 19, 1975). It would, therefore, be inappropriate to grant certiorari to again consider a question so recently and clearly settled by this Court.

II

EVEN IF THE HENDERSON ORDINANCE IS NOT CONSTITUTIONALLY INFIRM, THE ARREST OF APPELLANT UNDER THE ORDINANCE WAS WITHOUT PROBABLE CAUSE AND, THEREFORE, VIOLATED HIS FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.

It would not be appropriate for this Court to grant certiorari in order to review any of the questions presented by petitioner because on the facts of this case there was clearly no probably cause to arrest under the Henderson ordinance[1/]. Since the judgment of the Ninth Circuit would be affirmed on this ground, it would not be necessary to consider the broader issues involving the constitutionality of the statute.

It is somewhat unrealistic to discuss the existence of probable cause to arrest under the Henderson ordinance since, as discussed infra, the ordinance itself authorized arrest on less than probable cause. In addition, the elements of the offense are so vague that

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1/ The Henderson ordinance reads:

Every person is a vagrant who:
Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by a police officer to do so if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

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one cannot clearly decide with a reasonable degree of certainty exactly what the officer must have probable cause to believe before arresting. Assuming for the purpose of argument that the ordinance is sufficiently definite, the arresting officer did not have probable cause to believe that Mr. Powell had violated any of the elements of the vagrancy ordinance.

Before an officer is warranted in arresting a suspect for vagrancy under the ordinance, the officer must have probable cause to believe that:

1) the suspect is loitering or wandering from place to place without apparent reason or business;

2) the suspect must refuse to identify himself and refuse to account for his presence when so requested by the officer; and

3) the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identificaton.

None of the above three elements were established by Officer Lattin prior to the arrest of Mr. Powell.

Although the Ninth Circuit did not reach the question of probable cause to arrest under the ordinance, the Court correctly summarized the facts surrounding the arrest as follows:

> The arresting officer saw appellant and a companion walking across a parking lot in a shopping center. It was 10 o'clock Sunday morning. The adjacent stores were open and there were cars on the lot. The arresting officer knew nothing of the shooting in California the night before. There is nothing to suggest that he connected appellant with any other specific crime. He testified that appellant and his companion "appeared" to look at the police car, then "quickly" turned and walked in the opposite direction. They walked "in a

> rather rapid manner," occasionally looking back. When the police car turned and followed, the two men separated and walked in different directions. The officer followed appellant, and honked the patrol car horn. Appellant did not stop. The officer got out of his car and said, "Wait a minute." Appellant stopped. The officer asked if appellant had any identification. Appellant said he did not, that it had recently been stolen. The officer asked his name; appellant gave it. The officer asked appellant where he was staying. Appellant responded that he was staying with friends in Las Vegas (approximately eight miles north of Henderson), but he could not provide the name or address. The officer asked appellant where he was going. Appellant said he was en route to Michigan; the officer testified that Henderson is south of Las Vegas and not east on the most direct road to Michigan. He arrested appellant because appellant "had no real answer as far as where he had been staying nor the friends that he was with nor could [he] give me a reason for being in the Henderson area. . . ." After the arrest the officer conducted the search complained of. 507 F.2d at 95 n.2

With respect to the first element of the offense, it is clear that this brief observation of two people walking together in an open shopping center is an insufficient basis to form a reasonable belief that they were loitering or wandering from place to place without apparent reason or business. Certainly many people must walk about in the shopping center and its parking lot, changing direction frequently. Likewise, many citizens would undoubtedly "appear" to look in the direction of a cruising police unit, and if the officer also "appeared" to be looking at them and made a U-turn, the citizen would no doubt continue to direct his attention towards the police officer.

Officer Lattin testified that he was suspicious of Mr. Powell because he could not recognize him. This

This is quite understandable considering considering Henderson had an approximate population of 16,000 people and the shopping center where Mr. Powell was arrested is bordered by a major interstate highway, U.S. 93. In fact, Henderson is between Hoover Dam and Las Vegas on U.S. 93. Local casinos advertise Henderson as a place to stop for tourists on their way to see that world famous construction. (C.T. 141).

With respect to the second element of the offense, the simple fact is that Mr. Powell did identify himself and account for his presence. He gave his true name and age. Officer Lattin testified that Mr. Powell appeared to be a man of the approximate age given. He ran a name check on Mr. Powell, and the result was negative. Officer Lattin did not even try to confirm the validity of the name with Mr. Powell's companion, Mr. Chaney. Officer Lattin testified that he had no reason other than his own "suspicious nature" (R.T. 205) to believe the name and birthdate were false.

Mr. Powell accounted for his presence by telling Officer Lattin that he stayed with some friends in Las Vegas for a few days and he was on his way to Michigan. The officer had no reason to doubt the fact that Mr. Powell was going to Michigan, and Mr. Powell's statements were in no way contradictory. Henderson is only eight miles from Las Vegas. Although Henderson is smaller than Las Vegas, both cities are gambling and entertainment meccas relying to a large extent, if not primarily, on out of state, transient business. (C.T. 141). The nature and proximity of the cities belies any contention that

someone bound for Michigan might not find himself temporarily in Henderson.

Mr. Powell was arrested merely because he did not give the exact number of days he had spent in Las Vegas and because he could not give the name and address of his friends there. Neither of these facts would seem unusual for one in transit from one state to another. In addition, it would seem unreasonable to arrest someone for failure to account for his presence on the grounds that he did not know how many days he had been somewhere else.

Nothing in the transcript indicates that public safety demanded Mr. Powell's identification. There was no evidence that this shopping center was an area of high incidence of crime, nor had there been any reports of recent crimes or suspicious prowlers. The only indication that there was anything differentiating Mr. Powell from his fellow shoppers was that Officer Lattin testified petitioner and his companion "appeared to look at my police unit" and then walked the other way, subsequently parting company. (R.T. 195). Every day there must be many shoppers in the center who look at the unit and walk in the opposite direction. Certainly they are not all potentially subject to stop and arrest for this innocuous conduct.

This Court has held that conduct, like Mr. Powell's manner of walking, which might be characterized as "furtive" by an officer, is insufficient for an arrest and search unless the officer can couple the conduct with "specific knowledge . . . relating the suspect to the

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evidence of a crime." Sibron v. New York, 392 U.S. 40, 66-67 (1968). Officer Lattin stated that he had no such specific knowledge. He had only his own "suspicious nature." (R.T. 205) Unless the probably cause requirement is to be abandoned altogether, a police officer's suspicious nature may not be used as a substitute for the specific, articulable facts creating a reasonable belief that the defendant is guilty of a crime. Since there was no probable cause for the arrest, the evidence seized in the search must be suppressed. Mapp v. Ohio, 367 U.S. 643 (1961)

III

THE HENDERSON ORDINANCE IS UNCONSTITUTIONAL BECAUSE IT IS VAGUE AND BECAUSE IT AUTHORIZES ARREST AND CONVICTION ON LESS THAN PROBABLE CAUSE TO BELIEVE THAT A CRIME HAS BEEN COMMITTED.

According to recent decisions of this Court and other state and federal courts, the constitutional deficiencies of the Henderson ordinance are so apparent that it would be an inappropriate allocation of judicial effort to grant certiorari on this issue. In fact, this Court has declined to review two recent decisions striking down a similar New York vagrance law statute. Lefkowitz v. Newsome, 43 U.S. L.W. 4284, 4285 (U.S. Feb. 19, 1975); People v. Berk, 32 N.Y.2d 567, 300 N.E. 2d 411, cert. denied, 414 U.S. 1093 (1973). Without attempting fully to brief the matter, some of the reasons for the ordinance's invalidity are outlined below.

The ordinance is unconstitutionally vague on its face and as applied.

The Henderson ordinance reads:

> Every person is a vagrant who: Loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when asked by a police officer to do so if surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

The offense of vagrancy under the ordinance constitutes the conjunction of three broad elements: (1) "loiter[ing] or wander[ing] upon the streets. . . without apparent reason or business," (2) "refusing to identify himself and to account for his presence," and (3) "surrounding circumstances. . . such as to indicate to a reasonable man that the public safety demands such identification."

The first element of this offense is strikingly similar to a similar Florida vagrancy ordinance which this Court held unconstitutionally vague on its face. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). The offending language in the Jacksonville ordinance read in part

> [P]ersons wandering or strolling around from place to place without any lawful purpose or object. . . shall be deemed vagrants. . . . 405 U.S. at 156-57 n. 1

This Court struck down the ordinance because it was

> void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' United States v. Harriss, 347 U.S. 612, 617, and because it encourages arbitrary and erratic arrests and convictions. Thornhill v. Alabama, 310 U.S. 88; Herndon v. Lowry, 301 U.S. 242.

This Court went on to say that by criminalizing "wandering or strolling" the statute included conduct extolled by Walt Whitman and Rachel Lindsay. The law also included within its ambit innocent activities which are part of the amenities of life as we have come to know it. The law provides no guidelines by which enforcement authorities may distinguish between innocent and unlawful conduct, and, by allowing arrest and conviction on suspicion, it invited arbitrary and erratic application by placing almost unfettered discretion in the hands of the police.

One year prior to Papachristou, this Court unanimously held that the phrase "without visible or lawful business," as applied to someone discharging a woman (whose name he claimed not to know) from his automobile late at night, under somewhat suspicious circumstances, was unconstitutionally vague as applied. Palmer v. City of Euclid, 402 U.S. 544 (1971). Two of the justices would have held it unconstitutional on its face. If the Euclid ordinance was unconstitutionally applied under the suspicious circumstances of the Palmer case, then certainly the phrase "without apparent reasons or business" (a broader and more vague injunction than the Euclid ordinance) is unconstitutional if applied to a citizen walking with a companion in a shopping center during daylight business hours.

The second element of the Henderson ordinance (that of refusing to identify himself and to account for his presence) suffers from the same infirmities of vagueness. Assuming for purposes of argument that the

phrase "identify himself" is sufficiently clear, the ordinance is written in the conjunctive and requires that the suspect also "account for his presence." This latter phrase would be a nullity if any account, no matter how bizarre or unreasonable, were to satisfy the requirements of the statute, so it must be that something further is required--either a "good" account, or a "satisfactory" account, or an account "satisfactory to the officer."[2/] Since the Henderson statute does not designate what kind of account is required, it is even more vague than similar "good" or "satisfactory" account statutes that have been struck down in other cases. See Ricks v. District of Columbia, 414 F.2d 1097, 1104-05 (D.C. Cir. 1968); Baker v. Binder, 274 F. Supp. 658, 664 (W.D. Ky. 1967); United States v. Margeson, 259 F. Supp. 256, 268-69 (E.D. Pa. 1966). Fifth amendment considerations aside, such statutes suffer from the same deficiencies as those decried by this Court in Papachristou--they fail to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, and they encourage arbitrary and erratic arrests and convictions.

In Papachristou itself, this Court quoted with approval from President Roosevelt's message vetoing a proposed District of Columbia "account" statute and his reasoning that

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2/ It is clear that the arresting officer believed he had a right to demand an account which was satisfactory to him. Officer Lattin testified that he arrested Mr. Powell "due to the fact that the subject had no real answer as far as where he had been staying nor the friends that he was with nor could give me a reason for being in the Henderson area, I consequently did place him under arrest." (R.T. 199) (Emphasis added).

> "[w]hile this phraseology may be suitable for general purposes as a definition of a vagrant, it does not conform with accepted standards of legislative practice as a definition of a criminal offense. . . . It would hardly be a satisfactory answer to say that the sound judgment and decisions of the prosecuting officers must be trusted to invoke the law only in proper cases." 405 U.S. at 166-67 n. 10

The final element of the offense under the Henderson ordinance ("surrounding circumstances. . . indicate to a reasonable man that the public safety demands such identification") provides even less guidance to the citizen than the first two elements. The ordinance does not provide that the citizen must know what circumstances give rise to the officer's suspicion, nor does it provide that the officer is to inform the citizen. Thus, an element of the crime is something beyond both the citizen's control and the citizen's knowledge. In addition to providing no notice to the citizen, the third element of the offense suffers from the same vagueness deficiencies as the first two elements. Words and phrases like "surrounding circumstances," "indicate to a reasonable man," "public safety," and "demands," are so vague that they permit arrests and convictions for purely innocent conduct. A more narrowly drawn New York statute ("circumstances which justify suspicion that [a person] may be engaged or about to engage in crime") was struck down in United States ex rel. Newsome v. Malcolm, 492 F.2d 1166, 1173 (2d Cir. 1974).[3/]

3/ Although this Court reviewed the case on another issue, this Court declined to grant certiorari on the issue of the New York statute's constitutionality. Lefkowitz v. Newsome, 43 U.S.L.W. 4284, 4285 (U.S. Feb. 19, 1975). Likewise, this Court declined to review the New York Court of Appeal when it struck down this same statute as being vague and in violation of the right against self-incrimination and the privileges and immunities clause. People v. Berk, 300 N.E.2d 411, 32 N.Y.2d 567, cert. denied, 414 U.S. 1093 (1973).

The Henderson ordinance violates the Fourth Amendment because it authorizes arrests and convictions on less than probable cause.

It is elementary that an arrest, to be valid, must be based on probable cause. United States ex rel. Newsome v. Malcolm, supra, 492 F.2d at 1172. See also Papachristou, supra, 405 U.S. at 169-70; Hall v. United States, 451 F.2d 831 (D.C. Cir. 1972)(en banc), noted in 47 N.Y.U.L. Rev. 595 (1972) and 18 Vill. L. Rev. 117 (1972). The Henderson ordinance negates the probable cause requirement in two ways. First, by defining the offense in vague terms, it is not possible for the citizen or the officer to determine whether or not there is probable cause to believe that each element of the offense has been committed. Hall v. United States, supra, 459 F.2d at 837. Secondly, by criminalizing suspicious conduct the ordinance authorizes a full custodial arrest and conviction under circumstances which constitutionally justify no more than an investigative stop. Terry v. Ohio, 392 U.S. 1 (1968). Obviously, a state may not accomplish an end-run around the limited investigatory stop authorized in Terry by merely making it a crime to be a suspicious charactor, and then arresting and searching pursuant to the arrest for the crime. Newsome, supra, 492 F.2d at 1173. See Henry v. United States, 361 U.S. 98, 101, 104 (1959), Papachristou, supra at 546 (concurring opinion of Stewart, J.)

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IV

BY REQUIRING A SUSPICIOUS PERSON TO IDENTIFY HIMSELF AND TO ACCOUNT FOR HIS PRESENCE, THE HENDERSON ORDINANCE VIOLATES THE FIFTH AND FOURTEENTH AMENDMENT RIGHT NOT TO INCRIMINATE ONESELF.

Since the Ninth Circuit found the Henderson ordinance unconstitutionally vague, the Court did not reach respondent's argument that the clause requiring the suspect to "identify himself and account for his presence" violated the suspect's right to remain silent. Assuming, however, that the phrase "to identify oneself and to account for one's presence" has a sufficiently definite meaning to meet constitutional standards, by making silence an element of the offense, the ordinance makes the exercise of one's constitutional right not to incriminate oneself an element of the crime for which the suspected vagrant is arrested.

Since the unconstitutionality of doing so is clearly supported by this Court's prior decisions,[4/] and there is no conflict among the Circuit's on the point, it would not be appropriate to grant certiorari on this issue. In fact, this Court denied certiorari in a recent case striking down a similar vagrancy statute because, inter alia, it violated the right against self-incrimination. People v. Berk, 32 N.Y.2d 567, 300 N.E.2d 411, cert. denied, 414 U.S. 1093 (1973).

4/ Brooks v. Tennessee, 406 U.S. 605 (1972); California v. Byers, 402 U.S. 424, 434 n.6 (1971); Davis v. Mississippi, 394 U.S. 721, 727 n.6 (1969); Leary v. United States, 395 U.S. 6 (1969); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968); Marchettii v. United States, 390 U.S. (1968); Spevak v. Klien, 385 U.S. 511 (1967); Terry v. Ohio, 392 U.S. 1, 34 (1967) (concurring opinion of White, J.); Miranda v. Arizona, 384 U.S. 436 (1966); Murphy v. Waterfront Commission 376 U.S. 52 (1963).

V

EVIDENCE SEIZED PURSUANT TO AN ARREST UNDER A STATUTE WHICH VIOLATES THE FOURTH AND FIFTH AMENDMENTS SHOULD BE SUPPRESSED.

Petitioner asks this Court to grant certiorari in order to establish a rule that a city counsel may adopt an unconstitutional ordinance defining a crime which violates both the Fourth and Fifth Amendments, and then allow the prosecuting authorities to use any evidence seized in searches pursuant to arrests for the unconstitutional crime. Petitioner argues that the Ninth Circuit's opinion in this case conflicts with the Fifth Circuit's decisions in United States v. Kilgen, 445 F.2d 287, 289 (5th Cir. 1971), and United States v. Dameron, 460 F.2d 294 (5th Cir. 1972). However, as the Ninth Circuit pointed out (507 F.2d at 98), this conflict is more apparent than actual. Since both Fifth Circuit cases involved consent searches, the courts' statements that evidence seized under an unconstitutional statute should not be suppressed is merely dictum. Moreover, the dictum is at best ill-considered since the Fifth Circuit neither addressed the arguments set out below, nor cited any of this Court's decisions to the contrary. In addition, whatever doubt may have existed about the propriety of suppressing evidence seized under an unconstitutional statute at the time of the Kilgen and Dameron cases has been resolved by this Court's subsequent decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (suppressing evidence seized in compliance with federal statute).

In numerous cases this Court has held that in spite of the good faith of a searching officer or his

strict compliance with a statute, if the statute or underlying basis for the search is unconstitutional the evidence must be suppressed. In Almeida-Sanchez v. United States, 413 U.S. 266 (1973), this Court suppressed evidence discovered by immigrating officers even though the search was made in strict compliance with Section 287(a) of the Immigration and Nationality Act, 8 U.S.C. §1357(a), and the regulations promulgated thereunder. This Court stated that "it is clear, of course, that no Act of Congress can authorize a violation of the Constitution." Id. at 272. In Whiteley v. Warden, 401 U.S. 560 (1971), this Court rejected the argument that an arrest was valid because the arresting officer relying in good faith on a police bulletin indicating the defendants were wanted, made an arrest. The good faith and probable cause of the arresting officer could not be used as a shield against inquiry into the underlying constitutionality of the arrest. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), this Court held that whether or not probable cause existed, a search pursuant to a warrant issued by the Attorney General under authority of a state statute was invalid. Likewise, in Berger v. New York, 388 U.S. 41 (1967), the Court suppressed evidence seized in compliance with New York's wire tap law.

Petitioner attempts to distinguish this line of cases on the ground that the statutes relied upon by the officers "dealt directly with the standard and procedures governing searches and did not attempt to define a substantive crime. In short, each involved legislative encroachment upon Fourth Amendment rights." (Petitioner's Brief pp. 17-18). This distinction is

illusory since, as the Ninth Circuit pointed out, the very reason that the Henderson ordinance is unconstitutional is because it is a legislative encroachment upon the Fourth Amendment. It authorizes arrest and search for conduct which at the most would justify only a brief investigatory detention. In addition, the vagueness of the ordinance trenches on Fourth Amendment rights because it negates the probable cause requirement by making it impossible for the officer or citizen to answer the question "probable cause for what?" Obviously, a statute making it a crime to be a suspicious person could not stand on any better footing than a statute authorizing the arrest and search of suspicious persons.

Petitioner relies heavily on Pierson v. Ray, 386 U.S. 547 (1967). Pierson is clearly not in point because it involved a damage action against police officers who made arrests under a statute later declared unconstitutional. In holding that good faith and probable cause is a defense to an action under the Civil Rights Act of 1871 (42 U.S.C. §1983), this Court quite properly held that a police officer's lot is not so unhappy as to force him to become an insurer of the constitutionality of legislation. It simply does not follow that since a police officer cannot be forced to respond in damages, unconstitutionally seized evidence may be used with impunity. Neither in Pierson, nor in the subsequent cases cited above did this Court suggest that the Pierson rule should have any impact whatsoever on the exclusionary rule.

Not only is the appropriateness of the exclusionary rule so clear that is was assumed in the

line of cases culminating in Almeida-Sanchez, supra, but the basic rationale underlying the rule indicates that it is even more appropriate when the incursion on the Fourth and Fifth Amendment is accomplished legislatively by the city counsel. While one might be inclined to forgive a constable's blunder made under circumstances requiring quick and uncounseled judgment, a well counseled legislative encroachment on constitutional freedoms should not be given the imprimatur of the judiciary by allowing the unfettered use of the fruits of such an invasion. Terry v. Ohio, 392 U.S. 1, 12-13 (1968); Elkins v. United States, 364 U.S. 206, 222-23 (1960). "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." Mapp v. Ohio, 367 U.S. 643, 659 (1961).

Not only is unconstitutional legislation more highly visible to the public at large than a policeman's misconduct, but also the existence of such statutes has an impact on the security and well being of the public reaching far beyond the individual case. It is impossible to say how many thousands of innocent citizens have been harassed under the command of laws like the Henderson ordinance. Almeida-Sanchez, supra, at 173 n.5. Nor is it possible to measure the impact on the quality of life similar laws have had on others who wished only to walk upon the streets in enjoyment of the amenities of life in this country. Papachristou, supra, 405 U.S. at 164. As the Ninth Circuit correctly observed, legislators no less than policemen must be deterred from violating the

constitutional rights of citizens. 507 F.2d at 98; 47 N.Y.U.L Rev. 595, 602, 604 (1972).

The deterrence rationale underlying the exclusionary rule is even more appropriate when the constitutional violation is legislative than it is when the violation is the isolated conduct of an individual officer. One of the reasons given for adoption of the exclusionary rule was the lack of any other realistic remedy, such as damages against the officer. Mapp v. Ohio, supra, 367 U.S. at 651-53, 670. When the constitutional violation is legislative, not only are the practical problems of a damage remedy as insurmountable, but there is neither a right to sue the officer (Pierson, supra), nor a right to sue the legislators. Barr v. Matteo, 360 U.S. 564 (1959); Tenney v. Brandhove, 341 U.S. 367 (1951); See Monroe v. Pape, 365 U.S. 167 (1961).

It would be naive to adopt petitioner's suggestion that declaring the statute unconstitutional in a prosecution for vagrancy would be a sufficient deterrent. If this rule were adopted, the likelihood that the law would ever be tested is extremely slim. Vagrancy laws have traditionally been used as a pretext temporarily to remove undesirables from the street or to search for evidence of other crimes. In order to insure the continued ability of the police to make such arrests and searches under the vagrancy law, prosecutors would simply release the citizen after he has spent the night in jail, or, as was done in the present case, prosecute for the substantive crime revealed by the search.

This simple lesson has not been lost on police and prosecutors. For example, in People v. Williams, 55 Misc. 2d 774, 286 N.Y.S.2d 575 (New York City Crim. Ct. 1967) the court said

> these defendants are 41 of a group of alleged prostitutes who have been arrested and detained 2500 times for disorderly conduct and loitering in New York City since August 18th. . . . This Court of its own knowledge is aware that except for a few isolated instances where defendants pleaded guilty, the disorderly conduct cases were dismissed. In many instances, "the girls" were arrested after 11:30 P.M., too late to be arraigned, . . . then kept overnight in a cell. In the morning they were brought to Court and released because the offenses for which they had been arrested could not be proven to have been committed by them. 286 N.Y.S.2d at 577.

The Williams case was cited with approval by the Second Circuit in United States ex rel. Newsome v. Malcolm, supra, at 1173. After holding the New York disorderly conduct statute unconstitutional, the Second Circuit held that the evidence seized pursuant to an arrest under the statute must be suppressed. This Court affirmed the Second Circuit, but did not grant certiorari on this precise issue. Lefkowitz v. Newsome, 43 U.S.L.W. 4284, 4285 (U.S. Feb. 19, 1975).

Since arrest and search is the primary aim of those enforcing the vagrancy law, conviction for the substantive offense becomes unimportant. Viewed in this light, as a practical matter vagrancy laws are not laws defining substantive crimes, but are laws authorizing unconstitutional arrests and searches. It is not only probable, but likely that such laws could remain on the

books indefinitely.[5/]

Even if this Court were to adopt a general rule that evidence seized in searches under an unconstitutional statute should not be suppressed, nevertheless Mr. Powell should be entitled to have the evidence suppressed in his case. He is the first to have successfully challenged the constitutionality of this law, and as such, he is entitled to the fruits of his victory.[6/] The retroactive effect, if any, of the Ninth Circuit's opinion in this case should be left until it is squarely presented in another case.

5/ They could remain on the books at least until such time as a citizen with appropriate standing had both the assets and the Quixotic idealism to pursue an injunctive or declaratory relief civil rights claim against the police. Anderson v. Nemetz, 474 F.2d 814, 817, 821 (9th Cir. 1973) (civil rights action holding a "roams about from place to place without any lawful business" statute so clearly unconstitutional that it is "no longer a litigable issue . . . .") Given the impecunious and parapetic class of people who bear the brunt of vagrancy laws (Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L.J. 1, 4, 13 (1960)), and the unavailability of a damage remedy, such civil actions would be rare indeed.

6/ "Lawyers are meant to serve their clients, and they cannot at the same time serve the growth of the law if they know that time spent and emphasis expended upon novel or potentially disruptive points of law are unlikely to advance their client's interests." Gaither v. U.S. 413 F.2d 1061, 1085 (D.C. Cir. 1969). In Hall v. United States, 459 F.2d 831 (D.C. Cir. 1972), the court held that evidence seized under an unconstitutional statute should be suppressed since the defendant should get the benefit of the ruling even though others may not.

VI

INTRODUCTION OF THE DEATH WEAPON WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

It would not be appropriate for this Court to grant certiorari in order to review the question of harmless error, since there is no conflict among the circuits on the point, there are no important questions of law presented, and this Court's opinion would have no impact beyond the facts of the present case. In addition, the Ninth Circuit's opinion on the question is clearly correct.

Both the California Court of Appeal and the Federal District Court applied the wrong test for harmless error and, not surprisingly, they reached a wrong result. As the Ninth Circuit pointed out

> Both the California District Court of Appeal and the court below concluded that in light of other evidence in the record, the testimony regarding appellant's possession of the murder weapon in Nevada "was not required to establish any element of the crime charged." That is not the test. The question is whether it is ". . . possible for us to say that the State has demonstrated, beyond a reasonable doubt, that the [admission of the unlawfully seized evidence] did not contribute to [appellant's] conviction. . . ." Chapman v. California, supra, 386 U.S. at 26. In good conscience, we are unable to do so. 507 F.2d at 99.

One of the most hotly contested issues at the trial was the degree of the crime, if any. The jury could have returned verdicts of not guilty (either because Mr. Powell did not commit the crime, or because of self-defense or accident), involuntary manslaughter, voluntary manslaughter, second degree murder, or first degree murder. The seizure of the murder weapon from Mr. Powell in Henderson not only allowed the prosecutor to argue that Mr. Powell was the perpetrator of the crime, but also allowed the prosecutor

to demonstrate the trigger pull on the weapon to the jury. He even invited the jury to pull the trigger in order to show that "[i]t doesn't fire accidentally and it doesn't hit people accidentally either." In determining the degree of the crime, the trigger pull on the death weapon was one of the most important items of evidence in the case. Since it also appeared that the gun had been fired three times since Mr. Powell had left the liquor store, it cannot be said beyond a reasonable doubt that the evidence did not contribute to the conviction.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

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Dated: 3/18/75

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